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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 STEVEN D. PHEGLEY,

12 Plaintiff,

13 v.

14 CAROLYN W. COLVIN, Acting
15 Commissioner of the Social
Security Administration,

16 Defendant.
17
18

Case No. EDCV 14-0645 SS

19 MEMORANDUM DECISION AND ORDER

20 I.

21 INTRODUCTION

22 Steven D. Phegley ("Plaintiff") seeks review of the final
23 decision of the Commissioner of the Social Security
24 Administration (the "Commissioner" or the "Agency") denying his
25 application for Supplemental Security Income. The parties
26 consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of
27 the undersigned United States Magistrate Judge. For the reasons
28 stated below, the decision of the Commissioner is AFFIRMED.

II.

PROCEDURAL HISTORY

Plaintiff filed an application for Supplemental Security Income ("SSI") on November 30, 2011. (Administrative Record ("AR") 179). He alleged a disability onset date of November 29, 2007. (Id.). The Agency denied Plaintiff's application on March 9, 2012, and upon reconsideration on October 31, 2012.¹ (AR 109, 117). On November 21, 2012, Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). (AR 18). Plaintiff testified before ALJ Lawrence J. Duran on June 24, 2013 (the "ALJ Hearing"). (AR 40-60). On July 22, 2013, the ALJ issued a decision denying SSI. (AR 15-32).

Plaintiff filed a request for review of the ALJ's unfavorable decision on August 1, 2013. (AR 14). On February 10, 2014, the Appeals Council ("AC") adopted most of the ALJ's findings, including the finding that Plaintiff was not disabled. (AR 1-7). However, the AC disagreed with the ALJ's finding that Plaintiff was capable of performing his past relevant work. (AR 4). The AC found that Plaintiff retained the capacity to find employment as a housekeeping cleaner or a mail clerk. (AR 6-7). The Appeals Council's decision constituted the

¹ In a previous proceeding, an Agency administrative law judge ("ALJ") found Plaintiff disabled for a "closed period" of September 2005 to March 2006. (AR 18). The ALJ in the present action opined that Plaintiff had rebutted the presumption that he was not disabled after March 2006, by showing a material "changed circumstance." (Id.).

1 Commissioner's final decision. (AR 1). On April 11, 2014,
2 Plaintiff filed the instant action. (Dkt. No. 3).
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5 **III.**

6 **FACTUAL BACKGROUND**

7
8 Plaintiff was born on September 26, 1962. (AR 179). He was
9 forty-five years old as of the alleged disability onset date and
10 fifty years old at the time of the ALJ Hearing. (AR 37, 179).
11 He is divorced, has five children, and lives with his father.
12 (AR 41-42). Plaintiff previously worked as a restaurant manager,
13 a stocker for a mail order distributor, and an assembly line
14 worker (AR 215, 220), but did not work after 2002. (AR 55).
15 Plaintiff testified that he was unable to work due to an
16 inability to focus and difficulties with his memory. (AR 49).
17 Plaintiff has taken prescription medications for chronic
18 depression, attention deficit disorder and bipolar disorder. (AR
19 53).

20
21 Plaintiff is 52 years old. (AR 41). He has a valid
22 California Driver's License. (Id.). He finished the eleventh
23 grade, and can do simple math and count money. (AR 42). He was
24 incarcerated in 2002 for transportation of a controlled substance
25 and he has not had substantial gainful employment since that
26 time. (AR 43). He fixes his own meals, mops and sweeps,
27 vacuums, does dishes and laundry, and cares for pets. (AR 45).
28 He goes shopping, (AR 46-47), watches TV and uses a computer.

1 (AR 46-47). He sees family frequently, his girlfriend once a
2 week, spends approximately eight hours per day watching TV, reads
3 for thirty minutes each day, and spends about an hour and a half
4 on the computer. (AR 48).

5
6 Plaintiff has been diagnosed with major depressive disorder,
7 bipolar disorder, anxiety, polysubstance dependence and attention
8 deficit hyperactivity disorder ("ADHD"). (AR 339, 350). On
9 February 15, 2012, Plaintiff informed the consultative
10 psychiatrist that he had "been dealing with methamphetamines
11 since [age] 28," but last used these drugs in 2002. (AR 336).
12 The psychiatrist found Plaintiff to be "in full sustained
13 remission." (AR 339). Plaintiff admitted to being a former drug
14 addict and alcoholic but attended Alcoholics Anonymous and
15 Narcotics Anonymous. (AR 336, 340). Plaintiff also told the
16 psychiatrist that he had previously been arrested for driving on
17 a suspended license and for possession of methamphetamines, but
18 his license was later restored. (AR 337; see also AR 180).

19
20 Plaintiff has a history of morbid obesity and hypertension.
21 (See, e.g., AR 271, AR 332). Prior to his alleged disability
22 onset date, Plaintiff admitted to smoking one pack of cigarettes
23 per week and to smoking for at least twenty years. (AR 272,
24 281). Plaintiff has complained of low back pain associated with
25 a 1999 automobile accident, but an orthopedist who examined
26 Plaintiff on January 30, 2012, noted no bone, joint, or
27 neurological abnormalities. (AR 331-334).
28

1 **A. Treating Mental Health Physicians' Opinions**

2
3 **Riverside County Department of Mental Health**

4
5 Plaintiff first sought treatment at the Riverside County
6 Department of Mental Health ("County") on May 27, 2003. (AR
7 359). In an August 18, 2009 assessment, treating psychiatrist
8 Elizabeth Leonard diagnosed type II bipolar disorder. (AR 601).
9 Dr. Leonard noted Plaintiff's previous diagnoses with
10 intermittent explosive disorder and ADHD. (AR 602). Dr. Leonard
11 found Plaintiff depressed, with racing thoughts, motor agitation,
12 excessive anxiety, restlessness, fatigue and irritability.
13 (Id.). Plaintiff was taking prescription Lamictal, Seroquel,
14 Requip, Zoloft, and Wellbutrin.² (AR 603). However, Plaintiff
15 was responsive to interaction with others, had normal thought
16 processes and displayed an appropriate affect. (AR 604). On
17 April 17, 2012, Jesus Bucardo, M.D., another treating
18 psychiatrist, reported that Plaintiff's depression and anxiety
19 symptoms "continue improving", that Plaintiff was sleeping "OK"
20 with medication, and that Plaintiff did not experience any
21 "racing thoughts, paranoia, or angry outbursts." (AR 354).
22 Plaintiff was oriented, alert, able to concentrate and "in good
23 spirits." (Id.).

24
25 ² According to the National Institutes of Health, these
26 medications are prescribed for bipolar disorder (Lamictal,
27 Seroquel), restless legs syndrome (Requip), depression and
28 anxiety disorder (Zoloft), and depression (Wellbutrin),
respectively. See MEDLINEPLUS, <http://www.nlm.nih.gov/medlineplus/medlineplus.html>, and enter medication name in search box (last visited Feb. 26, 2015).

1 **B. Consulting Physicians' Opinions Concerning Plaintiff's**
2 **Mental Condition**

3
4 **1. Romualdo R. Rodriguez, M.D.**

5
6 On February 15, 2012, psychiatric consultative doctor
7 Romualdo Rodriguez examined Plaintiff. (AR 335-41). Plaintiff
8 described depression as his chief complaint. (AR 335).
9 Plaintiff reported struggling with "focus, concentration, losing
10 things, his mind jumping from subject to subject, and leaving
11 things unfinished and undone." (AR 336). Plaintiff attributed
12 his earlier methamphetamine use to an attempt to self-medicate
13 his ADHD. (Id.). Plaintiff reported having "a fair relationship
14 with family, relatives, friends, neighbors, and others." (AR
15 337). He could perform household chores, cook, bathe, drive,
16 shop and run errands. (Id.).

17
18 Although Plaintiff's affect was "somewhat sad," Dr.
19 Rodriguez found him alert, intelligent, and non-delusional. (AR
20 338). Dr. Rodriguez opined that Plaintiff could "understand,
21 remember, and carry out simple one or two-step job instructions"
22 but not "detailed and complex instructions." (AR 340-41)
23 (emphasis in original). Plaintiff was "[s]lightly limited in
24 ability to relate and interact with supervisors, coworkers, and
25 the public" and in his ability to "perform work activities
26 without special or additional supervision." (AR 341). Plaintiff
27 was also "slightly limited" in his ability to cope with workplace
28

1 stresses and "moderately limited" in maintaining concentration,
2 persistence and pace. (AR 341).

3
4 **2. Adrianne Gallucci, Psy.D., and J. Hartman, M.D.**

5
6 State agency consultative psychologist Adrianne Gallucci,
7 Psy.D., and psychiatrist J. Hartman, M.D., reviewed Plaintiff's
8 medical and psychiatric records on October 19, 2012. (AR 93-
9 107). Dr. Gallucci found that Plaintiff retained the mental
10 capacity to, inter alia, understand, remember and carry out
11 simple instructions; pay attention for two-hour segments, sustain
12 an ordinary routine, and maintain regular and punctual work
13 attendance; and respond appropriately to changes in work
14 routines. (AR 104). Dr. Hartman found that Plaintiff was
15 limited to unskilled work but had the capacity for simple,
16 repetitive tasks. (AR 106).

17
18 **C. Vocational Expert Testimony**

19
20 Vocational Expert ("VE") Joseph Torres testified during the
21 hearing. (AR 60-64). The VE identified two jobs -- stock clerk
22 and small products assembler -- as relevant work that Plaintiff
23 had performed in the previous fifteen years. (AR 61). As
24 further discussed in this decision, the Appeals Council later
25 rejected the VE's conclusion that these positions qualified as
26 past relevant work as Plaintiff did not make enough earnings for
27 these episodes of work to qualify under the Agency's regulations.
28

1 The ALJ posed several hypotheticals based on an individual
2 of Plaintiff's age and educational background with various non-
3 exertional limitations. The individual could perform simple
4 instructions, but could not perform fast-paced work. (AR 62).
5 The individual could not have "intense interaction with co-
6 workers, supervisors, or the public" or "intense concentration"
7 for more than one hour without a five-minute break. (Id.). The
8 VE opined that such an individual could perform Plaintiff's past
9 work as a stock clerk as Plaintiff had previously done the job,
10 but not according to the Dictionary of Occupational Titles
11 ("DOT") listing. (Id.). The individual could also work as an
12 assembler according to the DOT listing. (Id.). Alternatively,
13 the individual could find work as a packer, with 325,000 jobs
14 nationally and 1,900 regionally; a housekeeper cleaner, with
15 425,000 jobs nationally and 2,300 regionally; or a mail clerk,
16 with 250,000 jobs nationally and 1,600 regionally. (AR 62-63).
17 However, if the same individual had to be absent or "off-task"
18 five percent of the time, he would be unable to perform
19 Plaintiff's past relevant work or any other jobs. (AR 63).

20
21 **D. The Appeals Council's Review**

22
23 The Appeals Council adopted the ALJ's statements regarding
24 the applicable issues and facts, and largely adopted the ALJ's
25 findings and conclusions. (Id.). However, the Appeals Council
26 modified Plaintiff's RFC, adopting Dr. Hartman's finding that
27 Plaintiff was limited to frequent left overhead reaching. (AR
28

1 5). The Appeals Council also concluded that Plaintiff had no
2 past relevant work, because his earnings as a stock clerk and
3 small products assembler fell below the level required for
4 "substantial gainful activity." (AR 5; see also 20 C.F.R. §
5 416.960 (criteria for determining past relevant work)).

6
7 Once an ALJ or the Appeals Council determines that a
8 claimant has no past relevant work, the burden shifts to the
9 Commissioner to determine whether the individual may find
10 employment appropriate to his residual functional capacity. See
11 Tackett v. Apfel, 180 F.3d 1094, 1099 (9th Cir. 1999). Because
12 the Appeals Council found Plaintiff not disabled given his
13 vocational factors and RFC, it considered whether Plaintiff could
14 find other employment. (AR 5-6). The Appeals Council found that
15 Plaintiff could work as a housekeeping cleaner, with 425,000
16 positions nationally and 2,300 regionally, or a mail clerk, with
17 250,000 positions nationally and 1,600 regionally.³ (AR 6-7).
18 The Appeals Council's decision constituted the Commissioner's
19 final decision.

20 IV.

21 THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

22
23 To qualify for disability benefits, a claimant must
24 demonstrate a medically determinable physical or mental
25 impairment that prevents him from engaging in substantial gainful
26 activity and that is expected to result in death or to last for a

27 ³ These two jobs were also among those also identified by the VE.
28 (AR 62-63).

1 continuous period of at least twelve months. Reddick v. Chater,
2 157 F.3d 715, 721 (9th Cir. 1998) (citing 42 U.S.C. §
3 423(d)(1)(A)). The impairment must render the claimant incapable
4 of performing the work he previously performed and incapable of
5 performing any other substantial gainful employment that exists
6 in the national economy. Tackett, 180 F.3d at 1098 (citing 42
7 U.S.C. § 423(d)(2)(A)).
8

9 To decide if a claimant is entitled to benefits, an ALJ
10 conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920.
11 The steps are:
12

13 (1) Is the claimant presently engaged in substantial
14 gainful activity? If so, the claimant is found
15 not disabled. If not, proceed to step two.

16 (2) Is the claimant's impairment severe? If not, the
17 claimant is found not disabled. If so, proceed
18 to step three.

19 (3) Does the claimant's impairment meet or equal one
20 of the specific impairments described in 20
21 C.F.R. Part 404, Subpart P, Appendix 1? If so,
22 the claimant is found disabled. If not, proceed
23 to step four.

24 (4) Is the claimant capable of performing his past
25 work? If so, the claimant is found not disabled.
26 If not, proceed to step five.

27 (5) Is the claimant able to do any other work? If
28

1 not, the claimant is found disabled. If so, the
2 claimant is found not disabled.
3

4 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari,
5 262 F.3d 949, 953-54 (9th Cir. 2001) (citations omitted); 20
6 C.F.R. §§ 404.1520(b)-(g)(1) & 416.920(b)-(g)(1).
7

8 The claimant has the burden of proof at steps one through
9 four, and the Commissioner has the burden of proof at step five.
10 Bustamante, 262 F.3d at 953-54. Additionally, the ALJ has an
11 affirmative duty to assist the claimant in developing the record
12 at every step of the inquiry. Id. at 954. If, at step four, the
13 claimant meets his burden of establishing an inability to perform
14 past work, the Commissioner must show that the claimant can
15 perform some other work that exists in "significant numbers" in
16 the national economy, taking into account the claimant's residual
17 functional capacity ("RFC"), age, education, and work experience.
18 Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at 721; 20
19 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1). The Commissioner may do
20 so by the testimony of a vocational expert ("VE") or by reference
21 to the Medical-Vocational Guidelines appearing in 20 C.F.R. Part
22 404, Subpart P, Appendix 2 (commonly known as "the Grids").
23 Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001). When a
24 claimant has both exertional and non-exertional limitations, the
25 Grids are inapplicable and the ALJ must take VE testimony. Moore
26 v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000) (citing Burkhart v.
27 Bowen, 856 F.2d 1335, 1340 (9th Cir. 1988)).
28

V.

THE ALJ AND APPEALS COUNCIL DECISIONS

The ALJ employed the five-step sequential evaluation process and concluded that Plaintiff was not under a disability within the meaning of the Social Security Act from September 30, 2011, through the date of the ALJ's decision on July 22, 2013. (AR 19). At step one, the ALJ found that Plaintiff had not engaged in substantial gainful employment since September 30, 2011. (AR 20). At step two, the ALJ found that Plaintiff had the severe impairments of chronic lumbar sprain/strain, hypertension, major depressive disorder, bipolar disorder, attention deficit hyperactivity disorder ("ADHD"), anxiety, and schizoaffective disorder (20 C.F.R. § 416.920(c)). (AR 21). The ALJ found that Plaintiff also had polysubstance dependence, but that this condition was in "full remission." (Id.).

At step three, the ALJ found that Plaintiff's impairments, "considered singly and in combination, do not meet or medically equal the criteria of any medical listing" in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§ 416.920(d), 416.925, and 416.926). (Id.). The ALJ specifically noted that Plaintiff's mental impairments did not meet or medically equal the criteria of listings 12.02, 12.03, 12.04, and 12.06.⁴ (Id.). Because

⁴ The cited listings relate to organic mental disorders (12.02); schizophrenic, paranoid or other psychotic disorders (12.03); chronic affective disorder (12.04); and anxiety disorder (12.06). 20 C.F.R. § Pt. 404, Subpt. P, App. 1.

1 these listings' "Paragraph B" criteria must be considered at
2 steps four and five of the sequential evaluation process,
3 however, the ALJ factored these criteria into Plaintiff's RFC.⁵
4 (AR 22-23). The ALJ opined that Plaintiff faced only "mild
5 restriction" in his daily activities, which were "somewhat
6 normal." (AR 22). Plaintiff faced "mild" difficulties in social
7 functioning and "moderate" difficulties in concentration,
8 persistence, or pace. (Id.). The ALJ then found that Plaintiff
9 had the following RFC:

10
11 [Plaintiff] has the residual functional capacity to
12 perform a range of medium work as defined in 20 CFR
13 416.967(c) and [Social Security Rulings ("SSR")] 83-10
14 specifically as follows: [Plaintiff] can lift and/or carry
15 50 pounds occasionally and 25 pounds frequently; he can
16 stand and/or walk for six hours out of an eight-hour
17 workday; he can sit for six hours out of an eight-hour
18 workday; he should avoid even moderate exposure to machinery
19 and heights; he can perform simple instructions; he cannot
20 do fast paced work; he is precluded from intense interaction
21 with coworkers, supervisors, and the public; and he cannot
22 have intense concentration of more than one hour without a
23 five minute break in focus.

24
25 ⁵ The "Paragraph B" criteria are "1. Marked restriction of
26 activities of daily living; or 2. Marked difficulties in
27 maintaining social functioning; or 3. Marked difficulties in
28 maintaining concentration, persistence, or pace; or 4. Repeated
episodes of decompensation, each of extended duration." 20
C.F.R. § Pt. 404, Subpt. P, App. 1.

1 (Id. at 23). In making this finding, the ALJ stated that he had
2 considered all of Plaintiff's symptoms and their consistency with
3 the objective medical and other evidence, as required by 20
4 C.F.R. 416.929 and SSRs 96-4p and 96-7p. (Id.). The ALJ also
5 considered opinion evidence pursuant to 20 C.F.R. 416.927 and
6 SSRs 96-2p, 96-5p, 96-6p, and 06-3p. (Id.).
7

8 The ALJ found Plaintiff's allegations concerning the
9 intensity, persistence and limiting effects of his symptoms "less
10 than fully credible." (AR 24). Plaintiff's allegations were
11 inconsistent with objective medical evidence showing that
12 Plaintiff responded well to conservative treatment, including
13 "psychotropic medications." (AR 24, 26). The ALJ noted that
14 Plaintiff appeared observant and "very clear headed" during the
15 hearing, despite complaining of an inability to focus. (AR 24).
16 Plaintiff's treatment records showed that he oftejn failed to
17 take prescribed medications, including medication for bipolar
18 disorder. (Id., AR 27). However, when Plaintiff did take his
19 medications, his symptoms were "generally well controlled." (AR
20 24). Moreover, Plaintiff's ability to shop, drive, prepare
21 meals, perform household chores, use a computer, and spend time
22 with friends and family diminished the credibility of his alleged
23 functional limitations. (AR 24-25).
24

25 The ALJ gave "great weight" to assessments by Agency
26 examining psychiatrist Romualdo Rodriguez, M.D., and state agency
27 consultative physician J. Hartman, M.D. (AR 29). The ALJ found
28

1 both physicians' opinions reasonable and supported by the record
2 as a whole. (Id.). However, the ALJ gave "little weight" to the
3 opinion of Plaintiff's treating psychiatrist, Jesus Bucardo, M.D.
4 (AR 30). The ALJ found that Dr. Bucardo's assessment that
5 Plaintiff's difficulty with focus precluded work was inconsistent
6 with the objective medical evidence or Plaintiff's own testimony.
7 (Id.).
8

9
10 At step four, the ALJ found Plaintiff capable of performing
11 his past relevant work as a stock clerk and small products
12 assembler. (AR 31). In reaching this finding, the ALJ
13 considered testimony by VE Joseph Torres, who opined that an
14 individual with Plaintiff's RFC would be capable of performing
15 these jobs. (AR 31-32). Accordingly, the ALJ did not proceed to
16 step five.

17
18 After the ALJ issued his unfavorable decision, the Appeals
19 Council reviewed the case. (AR 1-7). The Appeals Council
20 affirmed the ALJ's determination that Plaintiff was not disabled,
21 but found that Plaintiff had no past relevant work. (AR 6).
22 Accordingly, the Appeals Council identified alternative work
23 based on Plaintiff's residual functional capacity. (AR 6-7). The
24 Appeals Council's findings constituted the Commissioner's final
25 decision. (AR 1).
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VI.

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STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), a district court may review the Commissioner's decision to deny benefits. "The court may set aside the Commissioner's decision when the ALJ's findings are based on legal error or are not supported by substantial evidence in the record as a whole." Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1097). The substantial evidence standard does not change "merely because the Appeals Council and the ALJ diverge." Howard v. Heckler, 782 F.2d 1484, 1487 (9th Cir. 1986). Rather, because the Appeals Council's ruling constitutes the Commissioner's final decision, its factual findings must be upheld if they are supported by substantial evidence. See 42 U.S.C. § 405(g).

"Substantial evidence is more than a scintilla, but less than a preponderance." Reddick, 157 F.3d at 720 (citing Jamerson v. Chater, 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant evidence which a reasonable person might accept as adequate to support a conclusion." Id. To determine whether substantial evidence supports a finding, the court must "'consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [Commissioner's] conclusion.'" Aukland, 257 F.3d at 1035 (citation and internal quotation marks omitted). If the evidence can reasonably support either affirming or reversing, the court may not substitute its judgment for that of the Commissioner. Reddick, 157 F.3d at 720-21.

VII.

DISCUSSION

Plaintiff challenges the ALJ and Appeals Council decisions on two grounds: (1) the ALJ and the Appeals Council rejected, without giving "specific and legitimate reasons," Agency consultative examiner Romualdo Rodriguez, M.D.'s opinion that Plaintiff is limited to simple one- and two-step instructions (Plaintiff's Memorandum, Dkt. No. 15, at 7-8); and (2) the DOT descriptions for both of the alternative jobs that the Appeals Council identified are inconsistent with Plaintiff's limitations. (Id. at 9). The Court disagrees with both contentions. The ALJ adopted, rather than rejected, Dr. Rodriguez's opinion, which was consistent with other evidence in the record. Furthermore, although only one of the alternative jobs identified by the Appeals Council comports with Plaintiff's limitations, this occupation provides positions in sufficient numbers to affirm the Appeals Council's decision.

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A. The ALJ Did Not Adopt An "Ambiguous" RFC When He Gave "Great Weight" To Both Consulting Psychiatrists' Assessments And Properly Credited Dr. Rodriguez's Opinion

Social Security regulations require the ALJ to consider all relevant medical evidence when determining whether a claimant is disabled. 20 C.F.R. §§ 404.1520(a), 416.927(c). "An ALJ's disability determination should be upheld unless it contains legal error or is not supported by substantial evidence." Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir. 2014).

Plaintiff contends that Drs. Rodriguez and Hartman, the state agency physician, arrived at conflicting assessments of Plaintiff's ability to function in a workplace. (Plaintiff's Memorandum at 7). According to Plaintiff, Dr. Rodriguez's limitation to "simple one to two step instructions is different from [Dr. Hartman's] limitation to simple and repetitive tasks." (Id.). Therefore, according to Plaintiff, when the ALJ and Appeals Council accepted Dr. Hartman's assessment, they "implicitly rejected" Dr. Rodriguez's opinion. (Id. at 7-8). Plaintiff asserts that the failure to state "specific and legitimate reasons" for this purported rejection is reversible error. (Id.).

The Court disagrees that consultative psychiatrist's opinion was in conflict with the state agency physician's findings. A restriction to "simple tasks" is consistent with an ability to

1 carry out "simple instructions." See Stubbs-Danielson v. Astrue,
2 539 F.3d 1169, 1174 (9th Cir. 2008) (state agency reviewing
3 psychologist's recommended restriction to "simple tasks" is
4 consistent with physician's assessment limiting claimant to "very
5 short simple instructions"). The ALJ's reference to one mental
6 limitation in Plaintiff's RFC did not constitute a "rejection" of
7 a consistent limitation in Dr. Rodriguez's opinion. See id.
8 Therefore, with respect to Plaintiff's limitations in
9 persistence, pace and concentration, there was no conflict in the
10 medical record for the ALJ or the Appeals Council to resolve.
11

12 Because the ALJ did not reject Dr. Rodriguez's opinion, he
13 was not required to provide "specific and legitimate reasons" for
14 doing so. The ALJ noted Dr. Rodriguez's "simple one or two-step
15 instructions" limitation and Dr. Hartman's "simple repetitive
16 tasks" limitation and concluded that both were "reasonable and
17 supported by the record as a whole." (AR 29). Moreover, the ALJ
18 specifically stated that "[b]ased on these two opinions the
19 undersigned found the claimant could perform simple
20 instructions." (AR 30). The Appeals Council incorporated the
21 medical consultants' findings of fact in its own decision and
22 specifically incorporated the "simple instructions" limitation in
23 its RFC. (AR 5-6). Therefore, the ALJ and Appeals Council
24 decisions were both supported by substantial evidence in the
25 record, and there was no error in the Appeals Council's decision.
26
27
28

1 **B. The Appeals Council Identified Alternative Jobs That Were**
2 **Consistent With Plaintiff's Limitations As Demonstrated By**
3 **The Medical Evidence**
4

5 Plaintiff contends that both jobs identified by the VE and
6 the Appeals Council are inconsistent with Plaintiff's
7 limitations. (Plaintiff's Memorandum at 9). The Court
8 disagrees.
9

10 **1. The DOT Description For A Housekeeping Cleaner Does Not**
11 **Include "Intense" Interaction With The Public And Is**
12 **Consistent With Plaintiff's RFC**
13

14 Plaintiff asserts that the DOT job description for a
15 housekeeping cleaner is inconsistent with Plaintiff's RFC, which
16 precludes Plaintiff from "intense interaction with coworkers,
17 supervisors, and the public." First, Plaintiff objects on the
18 grounds that "neither the ALJ nor the Appeals Council defines
19 what constitutes 'intense' interaction." (Plaintiff's Memorandum
20 at 10). Therefore, Plaintiff contends, the Plaintiff's RFC is
21 "ambiguous." (Id.). Second, Plaintiff contends that "the job of
22 a Housekeeping Cleaner would require [P]laintiff to be exposed to
23 intense interactions with coworkers, supervisors, and the
24 public." (Id.).
25

26 Plaintiff fails to cite any source for his contention that
27 work as a housekeeping cleaner requires "intense interaction
28

1 [with the public]." While the ALJ and the Appeals Council did
2 not define "intense interaction," the DOT description for a
3 housekeeping cleaner does not directly require personal
4 interactions of any kind. See 4 DOT 323.687-014. To the extent
5 that the DOT description indirectly addresses interactions with
6 coworkers, supervisors and the public, however, its requirements
7 are minimal. A housekeeping cleaner must possess Level One
8 Reasoning, meaning that he can "[a]pply commonsense understanding
9 to carry out simple one- or two-step instructions. Deal with
10 standardized situations with occasional or no variables in or
11 from these situations encountered on the job."⁶ Id. A
12 housekeeping cleaner must also be able to "[s]peak simple
13 sentences." Id.

14
15 These requirements are fully consistent with Plaintiff's
16 capabilities. Dr. Rodriguez found Plaintiff "[a]ble to
17 understand, remember, and carry out simple one or two-step job
18 instructions." (AR 340). Dr. Rodriguez considered Plaintiff
19 only "slightly limited in ability to relate and interact with
20 supervisors, coworkers, and the public." (AR 341). Similarly,
21 Dr. Gallucci found Plaintiff able to "[c]arry out simple
22 instructions" and "work in coordination with or proximity to
23 others," including coworkers, without distraction or interruption
24 due to psychological symptoms. (AR 104). Certainly, Plaintiff's
25

26 ⁶ In addition to requiring only Level One reasoning, the DOT
27 description rates this occupation as "light work" for the purpose
28 of assessing the required physical strength. See 4 DOT 323.687-
014.

1 testimony about his interaction with family and friends suggests
2 that he is capable of this level of interaction with others.

3
4 Plaintiff testified that he is "pretty good with people" and
5 only becomes nervous when confronted with a "large . . . room
6 with a lot of people." (AR 55). Plaintiff told Dr. Rodriguez
7 that he had a "fair relationship with family, relatives, friends,
8 neighbors, and others." (AR 337). Plaintiff regularly
9 interacted with members of his therapy group over a number of
10 years (AR 430-593), and volunteered with the National Alliance on
11 Mental Illness. (AR 59-60). Accordingly, there is no
12 inconsistency between Plaintiff's capabilities and the DOT
13 definition of a housekeeping cleaner.

14
15 **2. Plaintiff Is Not Capable Of Working As A Mail Clerk**

16
17 Plaintiff asserts that Plaintiff would be unable to perform
18 the second job the Appeals Council identified, mail clerk,
19 because this job requires reasoning skills that "exceed
20 [P]laintiff's limitation." (Plaintiff's Memorandum at 12).
21 Plaintiff contends that, under the DOT listings, a mail clerk
22 must possess "Level Three" reasoning skills that "exceed the
23 Appeals Council RFC assessment that limits Plaintiff to simple
24 instructions." (Id.). The Court agrees.

25
26 The DOT listing for a mail clerk incorporates "Level Three"
27 reasoning. See 4 DOT 209.687-026, 1991 WL671813 (1991). A mail
28

1 clerk should therefore be able to "apply commonsense
2 understanding to carry out instructions furnished in written,
3 oral, or diagrammatic form. Deal with problems involving several
4 concrete variables in or from standardized situations." Id.

5
6 The Ninth Circuit recently held that "there is an apparent
7 conflict between the residual functional capacity to perform
8 simple, repetitive tasks, and the demands of Level 3 reasoning."
9 Zavalin v. Colvin, ___F.3d___, 2015 WL728036, at *3 (9th Cir.
10 Feb. 20, 2015). "When there is an apparent conflict between the
11 vocational expert's testimony and the DOT -- for example, expert
12 testimony that a claimant can perform an occupation involving DOT
13 requirements that appear more than the claimant can handle -- the
14 ALJ is required to reconcile the inconstancy." Id. (citing
15 Massachi v. Astrue, 486 F.3d 1149, 1153-54) (9th Cir. 2007). The
16 ALJ must ask the vocational expert whether his testimony
17 conflicts with the DOT and, if so, "whether there was a
18 reasonable explanation for the conflict." Massachi, 486 F.3d at
19 1153-54. "[I]n order for an ALJ to rely on a job description in
20 the Dictionary of Occupational Titles that fails to comport with
21 a claimant's noted limitations, the ALJ must definitively explain
22 this deviation." Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir.
23 2001).

24
25 Here, the ALJ asked the vocational expert whether there were
26 any inconsistencies between the ALJ's hypotheticals and the DOT
27 descriptions for the identified alternative jobs. (AR 63). The
28

1 vocational expert testified that the hypotheticals were
2 consistent with the DOT listings. (AR 64). Because the ALJ
3 found that Plaintiff could perform his past relevant work, the
4 ALJ did not base his decision on the availability of alternative
5 occupations. (See AR 31-32). However, the Appeals Council based
6 its finding that Plaintiff was not disabled on the availability
7 of alternative work that was appropriate given Plaintiff's
8 limitations. (AR 6-7). The Appeals Council adopted the
9 vocational expert's findings. (AR 5-6). Accordingly, it neither
10 recognized nor resolved an apparent conflict between the
11 vocational expert's testimony and the DOT listing for a mail
12 clerk.

13
14 The Court must therefore determine whether the error was
15 harmless. See Zavalin, 2015 WL728036 at *3 (ALJ erred in failing
16 to reconcile apparent conflict between claimant's limitations and
17 DOT Level Three reasoning). The Court "may not reverse an ALJ's
18 decision on account of an error that is harmless." See Molina v.
19 Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012). Moreover, "[t]he
20 burden of showing that an error is harmful normally falls upon
21 the party attacking the [A]gency's determination." Id. (quoting
22 Shinseki v. Sanders, 556 U.S. 396, 409 (2009)).

23
24 Here, the error was harmless. Plaintiff contends that the
25 Appeals Council erred because both of the identified alternative
26 occupations -- housekeeping cleaner and mail clerk -- "require
27 demands that exceed Plaintiff's RFC." (Plaintiff's Memorandum at
28

1 14). Because the housekeeper cleaner position requires only
2 Level One reasoning, which requires an ability to "carry out
3 simple one- or two-step instructions," the Appeals Council
4 decision must be upheld. See 4 DOT 323.687-014. The
5 consultative examining physician specifically found that
6 Plaintiff possessed this ability. (AR 340).
7

8 Under the Social Security Act, an individual will not be
9 found disabled if, given his physical and mental limitations, he
10 is able to perform work "which exists in significant numbers
11 either in the region where such individual lives or in several
12 regions of the country." Beltran v. Astrue, 700 F.3d 386, 389
13 (9th Cir. 2012) (quoting 42 U.S.C. § 423(d)(2)(A)). The
14 vocational expert testified that 2,300 housekeeping cleaner jobs
15 exist regionally and 425,000 exist nationally. (AR 62-63).
16 Although there is no "bright-line rule for what constitutes a
17 'significant' number of jobs," id., the Ninth Circuit has found
18 2,300 or fewer positions in a regional economy to be sufficient.
19 See Moncada v. Chater, 60 F.3d 521, 524 (9th Cir. 1995) (2,300
20 jobs in San Diego County and 64,000 nationwide is sufficient);
21 Thomas v. Barnhart, 278 F.3d 947, 960 (9th Cir. 2002) (1,300 jobs
22 in Oregon region and 622,000 nationally is sufficient).
23

24 Accordingly, substantial evidence in the record supports the
25 Appeals Council's finding that Plaintiff may find a "significant"
26 numbers of jobs in the regional economy, and that Plaintiff is
27 not disabled. Because the decision remains valid, any error in
28

1 involving the mail clerk position is harmless error. No remand
2 is required.

3
4 **VIII.**
5 **CONCLUSION**
6

7 Consistent with the foregoing, IT IS ORDERED that Judgment
8 be entered AFFIRMING the decision of the Commissioner. The Clerk
9 of the Court shall serve copies of this Order and the Judgment on
10 counsel for both parties.

11
12 DATED: March 2, 2015
13

14 /S/
15 SUZANNE H. SEGAL
16 UNITED STATES MAGISTRATE JUDGE
17

18 **THIS DECISION IS NOT INTENDED FOR PUBLICATION IN LEXIS, WESTLAW**
19 **OR ANY OTHER LEGAL DATABASE.**
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